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NO. 476

In the Supreme Court of the United States

OCTOBER TERM, 1970

SHELDON G. PERLMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Sheldon G. Perlman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The order of the Court of Appeals is not reported but is printed in the Appendix to this Petition (Appendix A). (Appendix B is the opinion of the Court of Appeals denying rehearing.)

The Court of Appeals' previous judgment contained in an unpublished order dated September 23, 1969, was vacated by this Court on February 21, 1970 (O.T. 1969, No. 873, ... U.S. ....., 25 L.Ed. 2d 36, 90 S.Ct. 813), and remanded to the Court of Appeals for further consideration in light of *Buie* v. *United States*, 396 U.S. 87.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1970 (Appendix A). Petition for Rehearing was denied by opinion filed July 2, 1970 (Appendix B).

The jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where the reviewing court recognized that a crucial issue in the case was whether the agent transferee gave the transferor an order form as required under 26 U.S.C. 4742(a), should not the transcript of evidence be relied upon for that determination rather than the Court of Appeals' inadvertent erroneous factual finding as to the evidence?

Where the statute makes it a crime to transfer marijuana, "except in pursuance of a written order of the person to whom such marijuana is transferred", may a conviction be suffered to stand where no proof at all is made by the government as to the delivery of the form?

2. If two defendants are charged in a joint venture with the illegal transfer of marijuana, and where one of the defendants remains outside of the United States during all of the occurrences, and where that out-of-country defendant is held accountable for the acts of the other defendant who made the actual transfer of marijuana to the government agent, then:

(a) if the record is silent as to whether or not the actual transferor did or did not transfer marijuana pursuant to a written order of the person to whom he transferred the marijuana, but

(b) proof is made by the agent's testimony that he did not transfer an order form to the out-of-country defendant,

is not such a conviction void for failure of proof?

3. Is not defendant's constitutional right to a fair trial violated when the trial court received and considered evidence of another similar crime when the crime charged, transfer of marijuana, was not an "intent crime"?

4. In order for the government to present evidence of other crimes under the exception that evidence is admissible when it is so blended or connected with the one on trial that proof of one incidentally involves proof of the other, must not the government demonstrate that such prejudicial evidence is blended with the evidence essential to the cause on trial?

5. Did the deportation by the government of the co-defendant who was a vital, participating witness to the events involved in the prosecution and was in fact the only person present at the actual alleged transfer of marijuana other than the government agent, whose hearsay statements were related by another witness, and admitted over objection, and who was deported shortly after writing the Judge that he possessed evidence to clear himself, estop the government from proceeding with the trial by reason of its suppression of a vital witness and crucial testimony, and deny the Petitioner his rights to confrontation and to present a defense?

6. Does 26 U.S.C. 4774 permit prosecution of an alleged transferor of marijuana in violation of 26 U.S.C. 4742(a) who is at all times concerned, in Tangier, Morocco?

7. Did the evidence which tended to establish a transfer by the defendant of marijuana to Harold Dalton, the co-defendant, only, rather than Robert F. Bottorff, the government agent, as charged, constitute a fatal variance?

8. Does the admission over objection of a recording, purporting to contain the defendant's conversation, surreptitiously made by interception, of an overseas telephone call, without adequate voice identification, violate 47 U.S.C. 605, the statutes of the State of Illinois, and the Petitioner's Constitutional rights, especially where it is collateral evidence related to a separate unindicted transaction, about four months before the transaction which is the subject of the indictment?

9. Should this Court reconsider its decision in *Buie* v. *United States*, 396 U.S. 87 and find that 26 U.S.C. 4742(a) does violate the provisions of the Fifth Amendment as to self-incrimination under the circumstances of this case?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

AMENDMENT IV to the Constitution of the United States.

"AMENDMENT IV—SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT VI to the Constitution of the United States.

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

TITLE 26, UNITED STATES CODE, §4742(a)

"§ 4742. Order forms

"(a) General Requirement.—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

"

TITLE 26, UNITED STATES CODE, §4774

"§ 4774. Territorial extent of law

"The provisions of sections 4701 to 4707, inclusive, and sections 4721 to 4776, inclusive, shall apply to the several States, the District of Columbia, and the insular possessions of the United States; and, in the case of narcotic drugs, shall also apply to the Trust Territory of the Pacific Islands and to the Canal Zone. On and after the effective date of the Narcotic Con-

trol Act of 1956, the provisions referred to in the preceding sentence shall not apply to the Commonwealth of Puerto Rico unless the Legislative Assembly of the Commonwealth of Puerto Rico expressly consents thereto in the manner prescribed in the constitution of the Commonwealth of Puerto Rico for the enactment of a law: *Provided*, That (notwithstanding section 7651), sections 4741 to 4762, inclusive, as amended, and, insofar as they relate to marihuana, sections 4771 to 4776, inclusive, shall not apply to Guam."

TITLE 47, UNITED STATES CODE, §605

"§ 605. Unauthorized publication or use of communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, ~~contents~~, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the

benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

STATEMENT OF THE CASE

NATURE OF THE CASE AND ITS DISPOSITION

This is an appeal from a conviction after trial on a single-count indictment. The case was commenced by the return of an indictment on May 24, 1966 (R. 2).

The indictment charges that on or about March 15, 1966, Harold J. Dalton and Sheldon G. Perlman, this petitioner, did unlawfully transfer approximately 24.583 grains of marijuana to Robert F. Bottorff, not in pursuance of the written order on a form issued by the Secretary of Treasury and prescribed by the Statute, Section 4742(a), Title 26, U.S.C.

On June 20, 1966, the co-defendant Harold J. Dalton entered a plea of guilty and was sentenced to the custody of the Attorney General for 5 years (R. 5, 5a).

The defendant Perlman was absent from the country at all times referred to in the indictment and for a long time thereafter so that the case, on motion of the Government,

was stricken from the call with leave to reinstate after the conviction, on his plea of guilty, of defendant Dalton (R. 9). On December 11, 1967, Perlman entered his plea of Not Guilty, after his return to the country. He was given leave to file motions on or before January 1, 1968, and the cause was continued until January 22, 1968 to be set for trial (R. 11).

On January 17, 1968, Perlman moved for the production of co-defendant Harold J. Dalton, who was presumably in custody, for an interview, and that motion was continued until January 22, 1968. The motion of Perlman was again continued until February 5, 1968, and on February 5, 1968, the Government sought and obtained 15 days to answer the defendant's motions for particulars and for production, and the cause was continued until March 4, 1968 (R. 12, 13, 14). Dalton, however, had been deported by the government on January 2, 1968, and could not be found. Prior to January 2, 1968, the co-defendant had been *serving a sentence entered* under the indictment in this case and was not eligible for parole until the Congress amended 26 U.S.C. 7237(d) making violators of the laws regarding marijuana eligible for parole.

On April 18, 1968, Perlman filed a motion for disclosure of evidence obtained from and concerning the co-defendant Harold J. Dalton, and after hearing on May 3, 1968, the said motion was granted (R. 15, 16).

No such evidence was ever revealed to Perlman prior to trial. On October 21, 1968, Perlman moved for production of all electronically or surreptitiously eavesdropped statements of the defendant reported by informers, co-defendants of government witnesses (R. 21).

On October 21, 1968, the Court denied the defendant's motion to dismiss the indictment because of the removal of an essential and participating co-defendant witness from the jurisdiction of the Court by the United States; and the motion of the defendant to dismiss the indictment because barred by the invalidity of the Statute under which it was brought, and because the prosecution was in violation of the Fifth Amendment; and the motion of the defendant for the suppression and return of all evidence obtained by electronic eavesdropping in any form, were each and all denied (R. 22).

On November 18, 1968, the case went to trial after the waiver of jury. Perlman moved to suppress a tape recording of a conversation between the defendant and a federal narcotics agent via overseas telephone, as having been unlawfully intercepted in violation of Section 605, Title 47, U.S.C.A., the Federal Communications Act and the Constitution as interpreted in *United States* v. *White*, 7 Cir., No. 16024-16022, March 18, 1968, later decided *en banc* and reported at 405 F.2d 838; and, after hearing, said motion was denied and the evidence was admitted and played for the Court (R. 23).

The Court overruled the renewed motion of Perlman which had been filed September 20, 1968, to dismiss the indictment because barred by invalidity of Section 4742(a), T. 26, U.S.C. in violation of the Fifth Amendment to the Constitution of the United States (R. 17). Said motion set forth in detail the scheme of laws relied upon to show the unlawfulness and the violation of the defendant's Fifth Amendment rights under *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85. The defendant further cited

in support of said motion, *United States* v. *Sanchez*, 340 U.S. 42, 95 L.Ed. 47, and *United States* v. *Covington*, 282 F.Supp. 886.

The defendant's written motion for dismissal of the indictment because of the removal of an essential and participating co-defendant witness from the jurisdiction of the Court by the United States (R. 18) was denied.

Both of these motions were overruled before trial, on their renewal during trial, and when raised in motions made after trial (R. 17, 18, 25), were overruled. The Court found Perlman guilty as charged, overruled the defendant's post trial motions for judgment of acquittal notwithstanding the finding of guilty, or in the alternative for a new trial (R. 27), and on January 6, 1969, sentenced Perlman to 5 years' imprisonment, and ordered the defendant's bond to stand on appeal (R. 29).

The conviction was appealed to the United States Court of Appeals for the Seventh Circuit, and on September 23, 1969, that Court entered an unpublished order reversing Perlman's conviction.

The United States sought certiorari, and on February 24, 1970, this Court granted certiorari, vacated the judgment of reversal, and remanded the case to the Court of Appeals (*United States* v. *Perlman*, ... U.S. ....., 25 L.Ed.2d 36, 90 S.Ct. 811) for further consideration in light of *Buie* v. *United States*, 396 U.S. 87.

Petitioner's counsel then moved the Court of Appeals for leave to file an amended brief within 30 days, and in an order dated April 6, 1970, the Court of Appeals granted that motion and ordered the United States to answer that amended brief 30 days after filing of the amended brief.

On April 21, 1970, before filing of Perlman's amended brief and without vacating the order of April 6, 1970, and apparently without considering the other questions raised by Perlman, the Court of Appeals entered an order affirming the judgment of conviction (Appendix X).

Perlman's counsel moved for reconsideration and rehearing, and the Court of Appeals ordered oral argument in the case. Oral argument was heard on June 10, 1970, and on July 2, 1970, the Court of Appeals entered its opinion denying the Petition for reconsideration and rehearing (Appendix B). The United States never filed a brief or any answer to Perlman's briefs or motions.

THE EVIDENCE

At the opening of trial, the jury waiver was presented and accepted (Tr. 2).

Perlman's attorney again moved for dismissal on the theory that the prosecution charged was barred by the Constitutional provisions against self-incrimination, and cited *Leary* and *Covington*, two cases then pending in the Supreme Court; further, the Court's attention was called to the removal of witness Dalton from the jurisdiction; also the defendant moved to suppress evidence of an alleged overseas phone call, claimed to have been intercepted and recorded by Agent Bottorff, on the basis of the *White* case then pending *en banc* decision by the Seventh Circuit Court of Appeals (Tr. 2-4).

ROBERT BOTTORFF stated he was a special agent with the Narcotics Bureau. In 1965 and 1966, in Chicago, he worked under cover and on December 4, 1965, he met a man called Simon Dalton in a North Side bar. No one else was present (Tr. 17).

On a government representation that there would be a joint venture proved, although at this point Perlman had not even been mentioned, the Court ruled that evidence of Dalton's statements to Bottorff would be heard, even though Perlman was on trial alone (Tr. 18).

Dalton told Bottorff he could get him large amounts of hashish from Shelly Perlman, and Bottorff sent a cablegram to Perlman at Tangier, Morocco, in wording supplied by Dalton.

After this, Dalton hand-printed a letter to Perlman, gave it to Bottorff for mailing and told him to put $20.00 in it and mailed it after making a copy (Gov. Ex. 1) (Tr. 30, 32).

After several repetitions of this type of communication, Bottorff said he received a phone call which he caused to be recorded (Tr. 34).

Over objection, Bottorff was permitted to testify that he recorded the conversation and that he now knew the other voice as Sheldon Perlman's, based on a single hearing of Perlman's voice, 2 years after the recording, when Bottorff met Perlman at a pre-trial production meeting in the United States Attorney's office where he produced and played the tape recording and Perlman attempted to record it. Bottorff said there was conversation by Perlman because Perlman's recorder would not work (Tr. 42).

Gov. Ex. 4 was identified by Bottorff as the tape of the conversation and a tape recorder of the type used (Tr. 44).

The tape was admitted over objection (Tr. 81), and was played for the Court (Tr. 81), but said playback was apparently not recorded or transcribed by the Court Reporter.

Bottorff then testified that on December 31, 1965, he received Gov. Ex. 6, 7, 7a, 7b and 7c. These were an envelope, Christmas card and a compressed sheet of marijuana (7c), enclosed in the Christmas card (Tr. 83-88).

Bottorff then testified concerning various letters which he induced Dalton to write and which Dalton gave to Bottorff who copied them and mailed them to Perlman, including one of January 10, 1966 in which he enclosed a $100 money order (Gov. Ex. 10, Tr. 95, 96), apparently intended in payment for the hashish received.

Bottorff also testified concerning letters allegedly in Perlman's handwriting, some unintelligible, which he received in a Post Office Box that Bottorff maintained as an undercover agent, and to letters given him by Dalton.

The next event of significance testified to by Bottorff is receipt from Dalton of a magazine and a quantity of hashish in the magazine which had cut-outs in its pages, which would hold a small package.

For this, Bottorff gave Dalton $100 and promised $75 more if it was hashish in the magazine. This all occurred on March 15, 1966, and apparently is the transaction prosecuted (Tr. 112-118) (Gov. Ex. 18, 19, 20, 21).

Bottorff was further permitted to testify concerning Government Exhibits 22, 23, 24, 25, letters obtained by him from Dalton after March 15, 1966.

Bottorff then said that he did not give Sheldon Perlman a written order form for transfer of marijuana, and that no one, *in his presence*, ever gave such an order form to Perlman (Tr. 121).

Contrary to the Court of Appeals statement in its opinion (App. 9), Bottorff was not asked and did not testify as to whether he or any one else ever gave Dalton an order form.

ON CROSS-EXAMINATION, Bottorff said he did not know whether Dalton gave Perlman a written order form from the Treasury Department (Tr. 122).

Bottorff admitted writing to his superiors on January 10, 1966 that the $100 he sent to Perlman "was not for payment of any future shipments" (Tr. 148).

WILLIAM RAEBEL, a narcotics agent, testified to arresting Sheldon Perlman on July 25, 1967, as Perlman alighted from Pan American flight 59 (Tr. 168).

CHARLES H. DUDLEY, a former Foreign Service officer of the Department of State, said that he was assigned as Vice Consul at the American Consulate at Tangier, Morocco, on August 16, 1966, and Sheldon Perlman signed a passport application before him. This was Government Exhibit 28, and was admitted as an exemplar of Perlman's handwriting (Tr. 169-179).

GERTRUDE WILD, a passport adjudicator, said that Government Exhibit 30 was a passport application executed in her presence. Exhibits 28 and 30 were admitted into evidence as handwriting exemplars of Perlman (Tr. 190).

HOWARD DOULDER testified that he was an examiner of questioned documents and identified all writing exhibits submitted to him as being in the handwriting or hand printing of Perlman (Tr. 200-235).

RAYMOND VALENTINE testified he was a chemist, employed by the government, and had tested Gov. Exs. 7c and 21, and they were hashish, a form of marijuana.

Mr. Valentine also revealed that marijuana seeds are sometimes used as bird seed (Tr. 246).

FRANK VERTOVEC testified that he was a narcotics agent and was present when Bottorff went to Dalton's house on March 15, 1966 and saw him come out with a magazine, Government Exhibits 19 and 21(a), a small package (Tr. 254-257).

ON CROSS-EXAMINATION, he admitted that the reports and Government Exhibit 21 did not indicate that the exhibits containing marijuana were obtained from anyone other than Dalton, and that the inscription on the exhibits 21(a) and 19 said that the marijuana was purchased by Bottorff from Dalton (Tr. 257-264).

The Government rested, and the Motion of defendant for Acquittal was denied (Tr. 265-293).

Perlman introduced Defendant's Group Exhibit 6 showing that Dalton was paroled for deportation on January 2, 1968 from Sandstone (Tr. 295-301).

Defendant's Exhibit 2, the transcript of the recording made by Perlman at a pre-trial meeting for production, was admitted as Defendant's Exhibit 2; and Perlman rested his case (Tr. 311).

Perlman's motion for acquittal at the close of all evidence was denied, and Perlman was found guilty (Tr. 315).

REASONS FOR GRANTING THE WRIT

I.

No Proof Was Made That A Written Order Form As Required For The Transfer of Marijuana Was Not Given To The Transferors.

The Court of Appeals mistakenly misstated the evidence in the Opinion to justify its affirmance of the conviction.

Defendant Perlman was charged in a one-count indictment with Harold J. Dalton, that on March 15, 1966, in Chicago, Illinois, they transferred marijuana to agent Robert Bottorff, not in pursuance of a written order form as prescribed by 26 U.S.C. 4742(a). That statute reads as follows:

> "It shall be unlawful for any person to transfer marijuana except in pursuance of a written order of the person to whom such marijuana is transferred on a form to be issued in blank for that purpose by the Secretary of Treasury or his delegate."

When this case was first before this court upon the Government's application for certiorari*, Perlman demonstrated in his brief in opposition that the only proof made as to the order form related to the testimonial denial by Bottorff that he gave Perlman a written order form for the transfer of marijuana. That was obvious because Bottorff had never seen or met Perlman until after Perlman's indictment.

Thus, the question was raised heretofore, but not decided by this court in remanding to the Seventh Circuit that it reconsider its holding, reversing Perlman's conviction, in

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the light of *Bute* v. *United States*, 396 U.S. 87. (..... U.S. ....., 25 L.Ed. 2d 36, 90 S.Ct. 811).

It is petitioner's contention that the government failed utterly in its proof. It did not show that Dalton, the actual transferor of the marijuana to Bottorff, did not receive an order form from Bottorff. This proof was essential as was recognized both by the trial judge and the Court of Appeals. But the Court of Appeals has—inadvertently, apparently—misread and misinterpreted the record. The government's proof is as follows:

> "Q. (By the prosecutor): Did you ever give the defendant Sheldon Perlman a written order form for the transfer of marijuana issued in blank by the Secretary of Treasury or his delegate?
>
> A. No.
>
> Q. Did anyone in your presence ever give the defendant Perlman such an order form?
>
> A. No." (Tr. 121)

But, as we pointed out, it was Dalton, Perlman's co-indictee, who transferred the marijuana to Bottorff. (Tr. 112-118)

However, the Court of Appeals mistakenly decided:

> ". . . But, as the district court recognized, the crucial issue was whether Bottorff had given Dalton such a form, *and Bottorff testified that he did not.*" (See Opinion, Appendix B. App. 9. Emphasis added.)

Thus, the necessity for making the required proof is recognized. And just as all of Perlman's objections to alleged conversations between Dalton and Bottorff were overruled on the joint venture theory that Perlman was responsible for Dalton's statements and actions, then Perlman is benefited by utter failure of government to prove that Bottorff did not give Dalton an order form.

The Seventh Circuit Court of Appeals recognizes and understands that when two defendants are jointly charged with transferring marijuana, that proof must be made by the government that neither was given a written order form. In a case decided July 22, 1970, *United States* v. *Escobedo*, 7 Cir., ... F.2d ....., No. 17112, two defendants, *Escobedo* and *Young*, were charged with transferring marijuana in violation of 26 U.S.C. 4742(a), similar to the indictment in the case at bar. Escobedo went to trial alone, his co-defendant *Young* having been granted a separate trial. After discussing testimony of the transfer of marijuana to the narcotics agent, the court stated:

> "Victoria and another federal agent, William W. Raebel, also testified that at no time did they or anyone else present to Escobedo or Michael Young a written order form required under 26 U.S.C. 4742(a) for the transfer of marijuana."

We submit that conflicting opinions by different panels in the same circuit on crucial law issues which are bound to be raised again and again, is grounds for the grant of certiorari.

It was, as both the district court and the Court of Appeals recognized, the burden of the government to prove absence of an order form during the transfer. The defendant does not have the burden of proving his innocence. *Bihn* v. *United States*, 328 U.S. 633.

The Fifth Circuit reversed a marijuana conviction in *Pena* v. *United States*, 386 F.2d 181 (1969), where the defendant was charged with being the transferee of marijuana without having paid the transfer tax. The court said, p. 182:

> "Cases of this kind are ordinarily successfully prosecuted by proof of possession by the accused per-

son, and a demand by the representative of the Secretary of Treasury that he 'produce the order form required by Section 4742 to be retained by him'.

* * *

Here, for some reason, not apparent on the record, the government agent failed to demand that Pena produce the order form required under Section 4742. There was no other proof offered that Pena failed to pay the tax on the marijuana which, as noted above, the trial court could find was at least constructively in his possession. In such situation, there was a complete lack of proof of one of the essential elements of the crime.

* * * "

In the government's brief submitted in *Minor* v. *United States*, 396 U.S. 87 (1970), wherein the Court upheld the constitutionality of the statute, the Solicitor General said, speaking of 26 U.S.C. 4705(a):

> "To secure conviction of the offense, the government must prove affirmatively, as it did in this case, (and as it did not do in the instant case), that no order form passed."
>
> Brief for the United States, p. 3 (Law Reprints, Criminal Law Series, Vol. 4, No. 5, 1969-1970 Term).

Similarly, it was later observed in the same brief:

> "No statutory presumption aids the government in a prosecution under 4705(a): *it must prove affirmatively* that no order form passed in order to secure a conviction."
>
> Brief for the United States, pp. 9-10 (Emphasis supplied)

Three pages later, the Solicitor General again stated that the government ". . . must affirmatively prove without

the defendant's aid that the sale was not in pursuance of a written order form". (Brief for the United States, p. 13).

We have diligently searched the cases in this court since the passage of the first Marijuana Tax Act statute in 1937, and do not find that the precise issue here presented has ever been considered or decided by this court. It is for that reason also that we pray certiorari be granted to decide a legal issue bound to recur, but which has not yet been decided by this court.

II.

Proof Of Other Similar Crimes Was Prejudicial Where The Crime Here Charged Was Not An "Intent" Crime.

The District Court, Sitting Without A Jury, Overruled Defendant's Objections To Testimony About Another Marijuana Transaction; The Court Then Improperly Considered Evidence Of Another Crime.

As the Court of Appeals stated, defendant's conviction is based upon an accusation that defendant Perlman and one Harold J. Dalton, illegally transferred marijuana to Robert Bottorff on March 15, 1966, in Chicago, Illinois. The offense, a violation of 26 U.S.C. 4742(a), is not a specific intent crime. The crime is proved when a transfer of marijuana is shown without a written order of the person to whom the marijuana is transferred. The intent exists in the act, for example, and is thus different from mail fraud cases, which permit the showing of prior similar transactions to prove requisite criminal intent.

Long before agent Bottorff testified about the March 15, 1966 transaction, he described, over continuing and repeated defense objections, a marijuana transaction which occurred in December, 1965 (Tr. 82-89). The following occurred:

"Mr. Walsh (defense attorney): Well, your Honor, this refers apparently to some transaction on December 31, which is not charged in the indictment.

"Mr. Breakstone (prosecutor): Your Honor, this is correct, it is part of the—the Government intends to introduce this transaction—as part of a common scheme and such is admissible under—

"The Court: Mr. Walsh is complaining that you did not get another count of this indictment for what transpired on the 31st of December.

"Mr. Walsh: And, he did not give us any notice of it." (Tr. 85)

The government chemist was even permitted to identify the substance transferred in December, 1965 as marijuana. When defense counsel objected, the Court stated:

"I cannot understand your failure to be grateful that they did not put two counts in." (Tr. 240)

Defense counsel objected nonetheless. (Tr. 240-241)

Thus, it is clear that the government intended to show a marijuana transaction in December, 1965, when the indictment charged only a March 15, 1966 transaction.

Evidence of other crimes are improper because they cause the jury to believe that defendant has a propensity for crime.

"The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

Michelson v. *United States*, 335 U.S. 469, 475.

In *Marshall* v. *United States*, 330 U.S. 310, the conviction was reversed where some jurors stated they had read some newspaper articles which indicated the defendant had prior felony convictions. Prejudice was conclusively presumed even in the face of the jurors' denial that they were in any way influenced by the news articles.

In a case where there was "overwhelming evidence of guilt"—as this one is not—the Fifth Circuit, in *Sumrall* v. *United States*, 360 F.2d 311, stated at p. 314:

> "We are, of course, loathe to reverse a case like this in the face of overwhelming evidence of guilt. Technical niceties such as these make the law appear ridiculous to the man on the street. 'But, 'All law is technical if viewed only from concern for punishing crime, without heeding the mode by which it is accomplished.' I.e. see Mr. Justice Frankfurter in *Bollenbach* v. *United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 90 L.Ed. 350."

Although a court trying a case without a jury is presumed to consider only proper evidence, where it is demonstrated from the record that the court improperly considered prior criminal transactions,

> ". . . there are, it seems to us, limits to the immunity to improper and prejudicial insinuations which judges are presumed to possess."
>
> *People* v. *Nuccio*, 43 Ill.2d 375.

III.

The Government Was Estopped From Proceeding With The Prosecution After It Paroled And Deported A Crucial Participating Witness, Without Notice, To The Court Or Petitioner, Which Concealed The Fact And Effectively Placed The Witness Beyond Subpoena Or Other Compulsory Process. The Petitioner Was Denied His Right To Confrontation.

The co-defendant, Harold J. Dalton, was sentenced to 5 years' imprisonment on June 20, 1966, after his plea of guilty to the indictment in this case (R. 5). Perlman, at that time, and for a long time theretofore, was a resident of Tangier, Morocco. After Perlman voluntarily returned to the United States, he was arraigned on December 11, 1967 and given until January 1, 1968 to file pre-trial motions, and the United States was given 10 days to respond thereafter. The cause was continued until January 22, 1968 to set for trial (R. 11).

On January 2, 1968, unknown to Perlman and apparently unknown to the Court, the co-defendant Harold J. Dalton, who had been imprisoned at Sandstone, Minnesota, was paroled for deportation on January 2, 1968, and in some manner, was shipped outside the boundaries of the United States. His parole was apparently an unrestricted release, for the Parole Board represents it has no knowledge of Dalton's whereabouts. The Immigration and Naturalization Service says he was shipped to Ireland, and that is all that it knows. Counsel for Perlman visited Ireland in an attempt to find Dalton and was informed that Dalton's Irish passport had been revoked, but that the Irish Government had no knowledge of his whereabouts, and that he could travel freely anyhere in the British Isles including Ireland, England, Scotland and Wales, without a passport.

His home on some documents was given as Bunerana, Donegal, Ireland, and Perlman's counsel visited there and was informed by police that a record of Dalton's arrival there would have been made had he come there as a parolee or deportee with a criminal record, but that no such record existed and there was no knowledge of such a person to be obtained from the police or residents of Bunerana. (See uncontradicted motion filed September 20, 1968, R. 18; and Government's Answer filed October 8, 1968, R. 20).

It might be noted that at the time of Dalton's incarceration, he was not eligible for parole by reason of 26 U.S.C. 7237(d).

For the Government to deport Dalton in the light of the testimony given in this case concerning his crucial, participating role in the events indicated by the evidence, was a flagrant and prejudicial denial of Perlman's right to compulsory process for witnesses in his behalf, and to confront the witnesses against him as guaranteed by the Sixth Amendment to the Constitution of the United States. Bottorff testified to Dalton's conversations with him on the contention that a joint enterprise was established (Tr. 16-18). In the light of the Government's effective concealment and removal of Dalton from the Court's process and jurisdiction, it is obvious that the Government was guilty of what amounts to wilful spoliation and concealment of evidence.

It is no defense for the Government to say that the matter of deportation of Dalton was not called to the attention of the particular Assistant U. S. Attorney charged with the actual prosecution. Although ours is a big government, with many divisions and agencies, the agencies involved in this concealment of the witness Dalton are all under the Attorney General of the United States. The United States

Attorney is part of the Department of Justice; so is the Parole Board, and so is the Immigration and Naturalization Service. It is extremely difficult to believe that Dalton could have been paroled and deported without some notification to the United States Attorney who convicted him, especially where a co-defendant still awaited trial. (See Dalton letter to Judge Austin, R. 7). Failure of the United States Attorney to be knowledgeable concerning the whereabouts and imprisonment of this important witness is no answer to the fact that the parole and deportation of Dalton was an act of the United States of America, which is but one government, and one party to this law suit and chargeable in this law suit with the derelictions or misdeeds of any of its departments or agencies.

The only remaining question under this point is whether there was prejudice to Perlman. The Government witness Bottorff testified to the receipt of two quantities of marijuana, one in December of 1965, and the second in March of 1966. The first quantity was received by him, he said, on what appeared to be a Christmas card mailed from Tangier, Morocco. The implication of his testimony was that this was a direct shipment by mail to him in Chicago, from Perlman in Tangier. In the course of describing this transaction, he related a substantial number of statements and acts of Dalton, the deported co-defendant (Tr. 11-62, 81-152).

In the period between December, 1965 and March 15, 1966, Bottorff related a great many acts and statements of Dalton, and in fact received the marijuana which is the subject of the indictment, about March 15, 1966, from Dalton (Tr. 112). At that time, Bottorff had never seen, nor did he know, Perlman, other than by a purported telephone conversation with an unknown person on an overseas telephone call.

There is absolutely no testimony concerning whether Dalton, when he secured the marijuana, had received or delivered a written order therefor upon a form prescribed and issued for that purpose by the Secretary of Treasury. Removal of Dalton from the country, therefore, violated Perlman's right to confront the witnesses against him. In any event, Dalton was unavailable to Perlman to testify as to the true nature of the incident of March 15, 1966 for which Dalton and Perlman were indicted, and by the removal of Dalton, the Government was in the position to present the version of Agent Bottorff, without contradiction, since no one other than Bottorff and Dalton participated in the acts and events where the transfer to Bottorff was alleged to have occurred under the allegations of the indictment, that is, "at Chicago in the Northern District of Illinois, Eastern Division".

Of course, if Dalton presented a written order on the official form to Perlman, then Perlman's transfer to Dalton would have been lawful, even though Dalton's subsequent transfer to Bottorff without such a form in Chicago would be unlawful. No proof whatever concerning receipt or non-receipt of such order form by Perlman exists.

In any event, Dalton's version of the events was unavailable by reason of the Government's actions, taken with obvious knowledge that a co-defendant, Perlman, was yet to be tried, and that an active participating witness, Dalton, could give crucial testimony. The Government's action in this case is far more flagrant than its action in *Roviaro* v. *United States*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623, where the identity of a participating witness to a transaction was concealed. In *Roviaro*, the Supreme Court said, 353 U.S. 53, at Page 64,

> "This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever having seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure."

In that case, the conviction of *Roviaro* and its affirmance by the Seventh Circuit Court of Appeals was reversed.

In the case at bar, the action of the Government is a more flagrant concealment of the truth in its proceedings against Perlman, and the transportation and concealment of a crucial participating witness estops the prosecution and invalidated the conviction.[1]

Contrary to the Court of Appeals' statement in its opinion (App. 7), apparently based on the statement of the Assistant United States Attorney at oral argument, it is not the customary governmental practice to parole and deport aliens convicted and serving sentences with substantial time left to serve. The incident in this case is the only parole and deportation that counsel for petitioner are aware of.

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[1] Consider the statement in Dalton's letter of July 1, 1966, from prison to Judge Austin, filed with the Clerk by the Judge on July 7, 1966, which says in part, "I would also like to know if it is possible to repeal the case, as I now possess sufficient evidence to possibly clear myself. I have kept silent only because the F.B.I. has indicated that if I did not, I would be subject to other charges. I feel that I should fight to try and save 5 years of my life, even at the risk of being sentenced for more. In my last letter I asked if there could be any possibility of deportation?" (R. 7)

IV.

At All Times Involved Herein, The Petitioner Was A Resident Of Tangier, Morocco, And Therefore There Was No Jurisdiction In The United States Courts.

At all times referred to in the indictment, and for a long time after the return of the indictment, the defendant Perlman was absent from the United States and was in fact a resident of Tangier, Morocco. (R. 9, Tr. 169-179).

The indictment herein charges that the Petitioner Perlman and one Harold J. Dalton transferred marijuana to one Robert F. Bottorff, not in pursuance of the written order on a form issued by the Secretary of Treasury, at Chicago, Illinois, on March 15, 1966, in violation of 26 U.S.C., Section 4742(a). (R. 2)

However, if for the sake of argument, it is believed that Perlman did what the government contends in its evidence, it would appear that he accomplished his act in Tangier, Morocco. (The evidence is to the effect that Perlman mailed hashish to Dalton from Tangier.) (Tr. 112-118).

Unquestionably, the transfer statutes requiring order forms are confined to transactions within the United States. *Thomas* v. *United States*, 5 Cir., 314 F.2d 936, 939, supports this view and holds that one who brings marijuana into the United States from Mexico is not subject to the order forms and transfer tax provisions because those sections contemplate a transfer within the United States. To the same effect, is *Marquez-Anaya* v. *United States*, 5 Cir., 319 F.2d 610.

Further, any doubt on this question seems to be dispelled by the provisions of Section 4774 of Title 26, U.S.C. which provides that the provisions of Sections 4701 to

4704 inclusive, and Sections 4721 to 4776 inclusive, should apply to the several states, the District of Columbia, and the insular possessions of the United States, and in the case of narcotic drugs, shall also apply to the trust territory of the Pacific Islands and to the Canal Zone.

The respondent Perlman performed all acts in which he was involved under the evidence in Tangier, Morocco, and did not return to the United States for a substantial period of time thereafter. He was not subject to prosecution or conviction since the Sections are specifically inapplicable by statutory statement to Morocco (26 U.S.C. 4774).

V.

The Evidence Which Tended To Show A Transfer Of Marijuana By Perlman To Dalton Only, Rather Than To Bottorff As Charged, Constituted A Fatal Variance In Proof And An Unconstitutional Amendment Of The Indictment.

The indictment in this case charges that Sheldon Perlman ". . . did unlawfully transfer to Robert F. Bottorff approximately 24.583 grams of marihuana, not in pursuance of a written order of Robert F. Bottorff on a form issued in blank for that purpose by the Secretary of Treasury or his delegate, in violation of Title 26, United States Code, Section 4742(a)." (R. 2)

The evidence in this case consisting primarily of the testimony of Agent Robert Bottorff was to the effect that Robert Bottorff received the marijuana in question from the co-defendant Harold Dalton and that, if the testimony of Bottorff is believed, Dalton had previously received the marijuana by mail from Perlman from Tangiers, Morocco (Tr. 11-62, 81-152).

Clearly, there is a variance between the act charged in the indictment (transfer by Perlman to Bottorff) and the proof adduced (alleged transfer by Perlman to Dalton who then transferred to Bottorff), *United States* v. *Raysor*, 3 Cir., 294 F.2d 563, 567.

It is argued that this variance in proof and charge is fatal to the conviction herein since for the conviction to stand there must be an unconstitutional amendment of the indictment.

The Supreme Court stated in *Stirone* v. *United States*, 361 U.S. 212, 217, 218, 4 L.Ed. 2d 252, 257, 80 S.Ct. 270:

> "While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare Berger v. United States, 295 US 78, 79 L ed 1314, 55 S Ct 629. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution . . . which the grand jury did not charge."

Also see: *Berger* v. *United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314; *Russell* v. *United States*, 369 U.S. 749, 770-772, 8 L.Ed. 2d 240, 254-256, 82 S.Ct. 1038; *Vincent* v. *United States*, 8 Cir., 337 F.2d 891, 895; *Crosby* v. *United States*, D.C. Cir., 339 F.2d 743, 744, 745; *Marsh* v. *United States*, 5 Cir., 344 F.2d 317, 320, 321; *Government of Virgin Islands* v. *Aquino*, 3 Cir., 378 F.2d 540, 554; *Thomas* v. *United States*, 5 Cir., 398 F.2d 531, 537-540.

As the Supreme Court so well stated in the *Stirone* case at 361 U.S. 216, 4 L.Ed. 2d 256:

> "The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."

The indictment in the case at bar did not charge Perlman with transferring marijuana to Dalton, but rather it charged a transfer to Bottorff. Proof that Perlman transferred marijuana to Dalton who later transferred it to Bottorff constitutes a variance between evidence and indictment which amounts to an unconstitutional amendment of the indictment in violation of the Fifth and Sixth Amendments to the Constitution, and for that reason the conviction should be reversed.

VI.

The Court Admitted, Over Objection, A Recording Of An Overseas Telephone Conversation, Without Sufficient Voice Identification, And Erroneously Refused To Suppress Said Recording As Having Been Obtained In Violation Of Section 605, Title 47 U.S.C., And The Constitutional Rights Of Perlman Under White v. United States, 405 F.2d 838, A Binding Precedent Upon The District Judge At The Time Of Trial.

Agent Bottorff testified that he received a phone call via overseas telephone, from a person he presumed to be Perlman. At that time, he did not know Perlman, and had never heard his voice. Bottorff then testified that he had caused an interception of the call from Tangier, Morocco to him in Chicago, and that by this interception, the call was recorded on tape. He further stated that he had

heard the tape, and that it was a correct version of the conversation he had. He gave no testimony setting forth what he had heard on that conversation other than this statement regarding the accuracy of the tape (Tr. 34-62). Bottorff stated that this overseas telephone conversation occurred on December 18, 1965.

Agent Bottorff then testified that the only time he ever heard Perlman speak was at a pre-trial production meeting in the United States Attorney's office, and at that time, he believed in the fall of 1967, he had a conversation with Perlman in the presence of his attorney, and that based upon this hearing of Perlman's voice, he was now able (at the time of trial) to recognize the telephone voice (Tr. 42). Bottorff contended that at this production hearing, Perlman attempted to copy the taped conversation recording and could not do so because the recording machine did not work (Tr. 51-53).

On a motion to suppress, Perlman testified that he did not speak, upon the instruction of his attorneys. He further testified that his recording machine did work efficiently, and did record the conversation contained on the tape produced at that meeting, and a transcript prepared from Perlman's recording was introduced in evidence as Defendant's Exhibit 1 (Tr. 62-68).

Further, Carl M. Walsh, Esq., testified (Tr. 305-310) that he is an attorney at law, formerly an Assistant State's Attorney for Cook County until February, 1968, and that he accompanied Sheldon Perlman and Maurice J. Walsh, the attorney for Sheldon Perlman, to the United States Attorney's office in March, 1968. He stated that Mr. Perlman had a small tape recorder, called a "Casette" tape recorder, and that at the United States Attorney's office,

Attorney Maurice J. Walsh, Attorney Carl M. Walsh, and Mr. Perlman, met with Assistant United States Attorney Morrissey and a federal agent named Bottorff. He further stated that at no time during that conference did Mr. Perlman speak. He said that a recording was played by Agent Bottorff, and that Mr. Perlman recorded the sound from the tape upon his "Casette" recorder. He said that Mr. Morrissey did not stay in the room during the playing of the record, and that after the meeting, he and Mr. Perlman played the recording on Perlman's recorder and that he, Carl M. Walsh, recorded it on an office recorder, and that thereafter, from this recording, his secretary, Miss Lucy A. Brem, made a transcript of the recording, Defendant's Exhibit 2, admitted into evidence, which showed that there was a sufficient recording of the material contained on Bottorff's recording, Government Exhibit 4.

Assistant United States Attorney Morrissey testified that he was not present during the entire time, but that as he recalled it, Perlman did speak, and that there was some general conversation about the failure of Perlman's tape recorder to operate. He admitted that he had never furnished a transcript of the recording, and that he did recognize Defendant's Exhibit 2 as being similar to the contents of Bottorff's tape, Government's Exhibit 4.

When it is recalled that Bottorff was unable to recall any words spoken by Perlman at this claimed fall, 1967 meeting, and was unable to recall that Mr. Carl M. Walsh was present, as was Mr. Morrissey, and that each was unable to recall that Perlman's tape recorder did work efficiently, and did record the contents of Bottorff's tape as shown by Defendant's Exhibit 2, then the proof of the Government concerning voice identification is indeed insufficient to support admission of Bottorff's tape, Government Exhibit 4.

The claim that Bottorff could identify Perlman's overseas telephone voice, two years after he had first heard it as that of an unidentified person, unknown to him, and that on the basis of an inaccurately remembered meeting, he could now identify Perlman's voice, is in contradiction to the presumption of innocence and the requirement that proof should be beyond a reasonable doubt.

There was no sufficient basis for the admissibility of the tape recording without regard to its illegality as unlawful eavesdropping.

Bottorff testified that his recording was made by interception of the telephone call between himself and the person who he claimed to be Perlman. He admitted that there was no signal given to show that there was an interception or recording of the telephone messages. He denied any knowledge of Section 605, Title 47 U.S.C., or the Illinois statute forbidding electronic eavesdropping. He claimed to be uninformed with regard to the case of *United States* v. *White*, 7 Cir., 405 F.2d 338, which was a narcotics case subject to widespread discussion by law enforcement officers and lawyers, and under which decision Mr. Bottorff's activity was illegal. At the time of trial, the Seventh Circuit Court of Appeals had reversed the *White* conviction on the ground of illegal eavesdropping of a defendant by the eavesdropping of *White's* conversation with an informer.

In the case at bar, *Bottorff* did not testify to the substance of the conversation, although he did characterize the tape recording as being a correct portrayal of what he heard on the telephone. Thus, in contrast to most cases of this type, Bottorff merely corroborated in a conclusory manner the inchoate witness, the tape recording. This

process by the prosecutor avoided effective cross-examination, and emphasizes the complete dependence of the conviction upon the eavesdropping, whether legal or illegal.

The defendant contends that it was illegal under the decision of this Circuit Court of Appeals in *White* v. *United States,* which was binding upon the District Judge as the law of the Circuit at the time of trial, and which later was affirmed by an *en banc* Court of this Seventh Circuit, and is reported at 405 F.2d 838. This Court has granted certiorari and the case is to be reargued in the 1970 October Term.

The defendant further contends that the intereception of the phone call and its recording was a violation of Section 605, Title 47, U.S.C., which prohibits the interception and publishing of telephone communications. The defendant further contends that it was in violation of regulations filed as part of the tariff of the telephone companies providing that where a call is being monitored or recorded, there shall be attached to the line a device provided by the Telephone Company giving a notification signal to the parties to the conversation that it is being recorded. Any recording in violation of this tariff is unlawful.

The defendant further states that such interception and recording of telephone messages by electronic eavesdropping is unlawful under the Statutes of the State of Illinois (Chapter 38, Section 14-1 et seq.) and under the decision of the Supreme Court of Illinois in *People* v. *Kurth,* 34 Ill. 2d 387, 216 NE 2d 154. It is submitted that this conviction cannot stand on the record made by the admission of Government Exhibit 4, Bottorff's tape recording.

The Court's attention is respectfully called to the fact that this telephone conversation was related to the transaction purportedly between Perlman and Bottorff in December of 1965, and did not support or prove the transaction of March 15, 1966, the only transaction prosecuted, which under Bottorff's testimony, was between Perlman and Dalton so far as Perlman's participation was concerned. Thus, the telephone call was collateral non-probative evidence which should not have been admitted for consideration.

VII.

The Court Should Reconsider Its Holding In Buie v. United States.

It is respectfully suggested that this Court should reconsider its holding in *Buie* v. *United States*, 396 U. S. 87, and find that the order form maintenance provisions of 26 U.S.C. 4742(d) when taken in conjunction with the provisions of 21 U.S.C. 176(a) as to smuggling and the provisions of 26 U.S.C. 4742(a), and considering that the acts alleged herein involve alleged sending of marijuana from Morocco to the United States, would incriminate Petitioner.

Further, it is suggested that because 26 U.S.C. 4742(a) and (d) place the duty upon the transferor to obtain an order form from the transferee and then to maintain it, the mere fact that the transferee does the actual registering and obtaining of the order form from the Secretary of Treasury, does not lessen the incrimination of the transferor who is compelled to maintain and produce on demand an incriminating record, a copy of which is filed with the Secretary of Treasury.

CONCLUSION

For the foregoing reasons, the Petitioner prays that his Petition for a Writ of Certiorari be granted, and that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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July, 1970.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 21, 1970

Before

Hon. Roger J. Kiley, Circuit Judge

Hon. Walter J. Cummings, Circuit Judge

Hon. Otto Kerner, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17543 vs.

SHELDON G. PERLMAN,

Defendant-Appellant.

ORDER

This court on September 23, 1969, entered an order reversing Sheldon G. Perlman's conviction, under 28 U.S.C. § 4742(a), on authority of the opinions of another panel in this court in *Santos* v. *United States*, No. 16985, and *Ward* v. *United States*, No. 16955, reversing convictions for violations, respectively, of 26 U.S.C. §§ 4742(a) and 4744(a)(1), and 26 U.S.C. §§ 4742(a) and 4744 (a)(1). However, on February 24, 1970, the United States Su-

preme Court in No. 873, *United States* v. *Perlman, et al.*, ... U.S. ..... (February 24, 1970), vacated this court's judgment in *Santos*, *Ward*, and *Perlman*, and remanded the cases to this court for further consideration in the light of *Buie* v. *United States*, 396 U.S. 87 (1969). The panel of this court which had decided separately *Santos* and *Ward* consolidated those cases on remand, and on April 14, 1970, filed its opinion applying the rationale of the Supreme Court in *Buie*, and in so far as pertinent to *Perlman*, affirmed the convictions of Santos and Ward with respect to the § 4742(a) violation.

IT IS THEREFORE ORDERED, on authority of the April 14, 1970 opinion in *Santos* and *Ward*, that Perlman's conviction under § 4742(a) be and it is hereby affirmed.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 17543

United States of America,

Plaintiff-Appellee,

v.

Sheldon G. Perlman,

Defendant-Appellant.

Appeal from United States District Court for the Northern District of Illinois, Eastern Division.

July 2, 1970

Before KILEY, CUMMINGS and KERNER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This case comes to us upon remand from the Supreme Court which vacated our earlier judgment[1] in light of *Buie* v. *United States*, 396 U.S. 87.[2]

[1] That judgment was contained in an unpublished order dated September 23, 1969.

[2] Defendant continues to insist that the action was barred by reason of the constitutional invalidity of 26 U.S.C. § 4742(a). However, we consider this contention foreclosed by the Supreme Court's action in vacating our initial decision to that effect on the authority of its decision in *Buie* v. *United States*, 396 U.S. 87.

On April 21, 1970, this Court entered judgment affirming defendant's conviction under 28 U.S.C. § 4742(a) on the authority of *Santos v. United States*, ... F.2d ..... (7th Cir. 1970), and *Ward v. United States*, ... F.2d ..... (7th Cir. 1970). Subsequently, defendant asked us to reconsider this ruling, and on June 10, 1970, oral argument was heard.[3] After careful consideration of the contentions presented by defendant in his motion for reconsideration, we decline to modify our order of April 21, 1970, and we now reaffirm defendant's conviction.

Defendant's conviction is based upon an indictment returned by the Grand Jury on May 24, 1966, charging Perlman and Harold J. Dalton with the illegal transfer of marijuana to agent Robert Bottorff of the Federal Narcotics Bureau on March 15, 1966, in Chicago, Illinois. This case received a bench trial. The evidence, taken in the light most favorable to the Government (*Glasser v. United States*, 315 U.S. 60, 80), reveals that agent Bottorff, working undercover in Chicago, contacted Dalton to arrange purchases of hashish, a form of marijuana, from Dalton's contact in Morocco. Dalton indicated that Bottorff would obtain the drugs by communicating with Dalton's confederate, Perlman, in Tangier, Morocco. Bottorff first cabled Perlman, using language supplied by Dalton. He then mailed a handwritten letter from Dalton to Perlman and enclosed $20. Subsequently, Bottorff received a telephone call from Perlman and various written communications from Tangier involving the illicit transactions. On March 15, 1966, Dalton telephoned Bottorff to inform him that Perlman had sent a magazine

[3] The May 15, 1970, order directed that this "appeal" be set down for oral argument, but this Court did not vacate its April 21, 1970, judgment of affirmance.

containing a quantity of hashish. The transfer was completed that same day in Dalton's apartment, and the material contained in the magazine proved to be the hashish involved in the indictment. In addition to the testimony by Bottorff concerning the statements of Dalton which implicated Perlman, the handwriting of the wrapping paper from the magazine, as well as the writing on the letters received by Bottorff, was Perlman's.

Jurisdiction and Variance

Defendant contends that the jurisdictional requisites for violation under Section 4742(a)[1] were lacking from the Government's case, and that a fatal variance existed in the prosecution's proof and the crime charged in the indictment. He rests both contentions upon the fact that, at all pertinent times, Perlman remained in Tangier, Morocco. The evidence revealed that the transfer from Dalton to Bottorff took place in Chicago and that defendant Perlman was not a direct participant there.

The Government's mode of prosecution, supported by a plethora of evidence, was that Perlman and Dalton were coconspirators involved in a joint venture whose object was the illegal transfer of hashish to agent Bottorff in Chicago. The critical transaction, Dalton's sale to Bottorff, took place in the United States, as required under Section 4742(a). See *United States* v. *Tramaglino*, 197 F.2d 928, 930-931 (2d Cir. 1952), certiorari denied, 344

[1] Section 4742(a) (26 U.S.C. § 4742(a)) states:

"It shall be unlawful for any person, whether or not required to pay a special tax and register under section 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

U.S. 864; *e.g., United States* v. *Padillo*, 374 F.2d 996 (2d Cir. 1967); *Brulay* v. *United States*, 383 F.2d 345, 349 (9th Cir. 1967), certiorari denied, 389 U.S. 986. Commission of the substantive offense by Dalton which accomplished the goal of the conspiracy rendered Perlman guilty of the same offense. *United States* v. *Zizzo*, 338 F.2d 577, 580 (7th Cir. 1964), certiorari denied, 381 U.S. 915, rehearing denied, 384 U.S. 982; *United States* v. *Chambers*, 382 F.2d 910, 914 (6th Cir. 1967); *United States* v. *Ward*, 360 F.2d 909, 910 (7th Cir. 1966).

We therefore hold that jurisdiction was proper for the prosecution under Section 4742(a), and that no variance existed between the crime charged in the indictment and the proof presented at Perlman's trial. Cf. *United States* v. *Schennault*, ... F.2d ..... (7th Cir. 1970).

Parole and Deportation of Codefendant Dalton

Defendant also urges that the parole and deportation of codefendant Dalton after Perlman's arraignment deprived defendant of his Sixth Amendment rights of confrontation and compulsory process of witnesses. Dalton had previously been sentenced to five years' imprisonment on June 20, 1966, after pleading guilty to the May 1966 indictment. At that time and subsequently until July 1967, defendant Perlman remained in Morocco. He was arrested on this indictment when he returned to the United States in July, and his attorney entered an appearance on Perlman's behalf on August 29, 1967. At his arraignment on December 11, 1967, defendant was given leave to file motions on or before January 1, 1968. Perlman had from July 1967 until Dalton was deported to seek to interview him, but Perlman's first such efforts began with his counsel's January 9, 1968, correspondence with prison officials. On January 17, 1968, having failed to locate Dalton informally, defendant moved for the production

of Dalton for an interview. Fifteen days beforehand, however, Dalton had been granted parole and immediately deported to Ireland. On January 22, 1968, the prosecutor notified Perlman of the deportation, and on May 3, 1968, the court granted Perlman's motion for the disclosure of evidence obtained from and concerning Dalton. Thereafter, on September 20, 1968, defendant Perlman unsuccessfully moved for the dismissal of the indictment because of the removal of Dalton and resulting "spoilation and suppression" of evidence.

At the outset, we reject any contention that the record discloses a deliberate attempt on the part of the Government to exclude from consideration relevant testimony of Dalton, whatever its content. Fraud upon the court may not be presumed but must be proved. *United States* v. *Oropeza*, 275 F.2d 558, 561 (7th Cir. 1960). The record here indicates that Dalton had been paroled and removed from the country prior to any inquiry by defendant Perlman and certainly prior to any request for his production by the prosecution. His parole and immediate deportation occurred in accordance with customary governmental practice to expel alien narcotics offenders. There is not the slightest hint that the prosecution in this case was aware of the action contemplated by the Immigration and Naturalization Service until well after Dalton had been sent abroad and disappeared from view.

Our rejection of any suggestion of prosecutorial misconduct in this case does not, however, imply that we approve of the Government's action. To do so would lend judicial sanction to an unnecessary lack of communication between coordinate administrative departments of the Federal Government. Dalton was no ordinary witness; he was the only codefendant and was the sole li-

rect participant in the March 15 transaction with agent Bottorff. He obviously possessed evidence regarding Perlman's participation in the illegal scheme. The Government itself elicited incriminating statements made by Dalton to Bottorff at Perlman's trial. In light of Dalton's final conviction, Perlman was entitled to the testimony of his codefendant if helpful to his defense. *United States* v. *Bronson*, 145 F.2d 939, 943 (2d Cir. 1944); cf. *United States* v. *Catella*, 414 F.2d 729, 731 (2d Cir. 1969), certiorari denied, 396 U.S. 860. Of course, the Government need not have perpetuated Dalton's incarceration merely to ensure his availability as a witness on the contingency that Perlman might desire that testimony. On the other hand, the Government's affirmative act of deporting Dalton effectively suppressed his testimonial evidence on the material issues of the case.[5] Under these circumstances, we feel compelled to inquire into the consequences which the absence of this witness might reasonably have had upon defendant's right to a fair and accurate determination of his guilt. Cf. *United States* v. *Walton*, 411 F.2d 283, 288 (9th Cir. 1969).

Our review of the record discloses no basis for questioning either the soundness of defendant's conviction or the fairness of his trial in the absence of Dalton. The Government's action does not amount to a willful affront to justice which would, in itself, render the conviction un-

[5] Perlman had already been arraigned and it would seem reasonable to require sufficient coordination between the various governmental institutions to permit notification thereafter and at least an opportunity for a defendant to determine for himself whether any benefit might be derived from the testimony of his codefendant. This would permit the various interests to be balanced and would avoid embarrassment to the Government in the future.

palatable. No bad faith concealment of exculpatory evidence is involved. Cf. *Napue* v. *Illinois*, 360 U.S. 264; *Miller* v. *Pate*, 386 U.S. 1. The Government did not deliberately frustrate defendant's attempts to obtain the evidence possessed by Dalton. Cf. *Roviaro* v. *United States*, 353 U.S. 53; *Smith* v. *Illinois*, 390 U.S. 129. We cannot, on this record, presume that Dalton possessed evidence favorable to defendant Perlman. The Government made available to defendant all material obtained from Dalton, yet Perlman has been unable to point to anything even suggesting possession of evidence favorable to himself. Cf. *Brady* v. *Maryland*, 373 U.S. 83; *Giles* v. *Maryland*, 386 U.S. 66. Defendant failed to contradict a single item of evidence produced by the Government. That evidence, quite apart from the damning statements of Dalton related by Bottorff at trial, convincingly substantiates this conviction. Disingenuous speculation, not reasonable doubt, is all that supports the expectation that Dalton, already having pled guilty to the indictment, could supply evidence which might raise a reasonable doubt as to Perlman's guilt. At the oral argument, Perlman's counsel suggested that Dalton's testimony might have shown that under 28 U.S.C. §4742(a), he did not give any written order form to Perlman; but, as the district court recognized, the critical issue was whether Bottorff had given Dalton such a form, and Bottorff testified that he did not.

Admission of Tape Recording

Defendant's remaining objections pertain to the trial court's reception into evidence of a recording made by the Government of a telephone conversation between agent Bottorff and Perlman occurring on December 18, 1965. The conversation was admissible because the recording took place two years prior to the effective dates of the decisions in *Katz* v. *United States*, 389 U.S. 347, and *United*

States v. *White*, 403 F.2d 838 (7th Cir. 1969), and was therefore not barred as evidence in this case. *United States* v. *Escobedo*, ... F.2d ..... (7th Cir. 1970). Since there was an adequate foundation and verification of the accuracy of the tape by agent Bottorff, there was also no error in the admission of the tape itself.

We have considered the other points raised by defendant and conclude that they are without merit. Therefore, the motion to reconsider the April 21, 1970, order of affirmance is denied.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.